United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

DLB-Cr-2

3/8 (1)

B R I E F F O R A P P E L L A N T

863

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL H. KLEINDIENST,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

No. 21,402

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Washington, D.C. 20001

Attorney for Appellant

QUESTIONS PRESENTED

1. Whether a motion to suppress should have been granted in a case where officers having received information from an informant concerning the presence of narcotics in a hotel room should have presented their information before a magistrate and obtained a search warrant prior to going to the hotel premises, and whether having contacted one judicial officer who stated that he was unable to come to his office to take the affidavit, the officers were obligated to attempt to contact another judicial officer?

2. Whether it is a violation of a person's rights under the Eight Amendment, pertaining to cruel and unusual punishments, for such person to be sentenced to a mandatory term of imprisonment, without possibility of probation or parole, for facilitating the concealment of narcotic drugs, where even though such person is a second offender, it is established that the person is an addict and the quantity of drugs was minimal.

3. Whether a motion for judgment of acquittal should have been granted in a case where two persons are found in a hotel room from which narcotic drugs had just been thrown, and no one actually saw one or the other of them throw the drugs out of the window?

4. Whether the Trial Court properly instructed the jury on the theory of joint possession of narcotics in a case where the Government contended that possession was in appellant alone?

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TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL N. KLEINBART,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

No. 21,408

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Michael N. Kleinbart, the defendant below, was convicted by a jury for violation of the Federal Narcotics Laws, Title 21, United States Code, Section 174, and upon conviction and sentence, an appeal was allowed by the Trial Court without prepayment of costs. This Court has jurisdiction pursuant to the provisions of Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE

Appellant, Michael N. Kleinbart, was indicted in two Counts charging him with violation of the Federal Narcotics

Law. The first Count of the Indictment alleged violation of the provisions of Title 26, United States Code, Section 4704a and the second Counts alleged violation of the provisions of Title 21, United States Code, Section 174. Appellant was tried by a jury on both Counts and was acquitted on Count One of the Indictment, but convicted on Count Two. He was sentenced to imprisonment for a term of Ten (10) years. Appellant had been adjudged a second offender under the Narcotics Laws.

The offenses alleged to have been committed by the appellant occurred on January 20, 1965, which was Inauguration Day. He was arrested in Room 903 of the Cairo Hotel in Washington, D.C., by officers of the Metropolitan Police Department, Narcotic Squad without a warrant.

Prior to the trial of this case, a motion to suppress evidence was filed on behalf of the appellant and the motion was heard before the then Chief Judge McGuire on April 9, 1965.

Officer David Paul of the Metropolitan Police Department, Narcotic Squad, testified at the hearing of the motion. He stated that appellant was arrested on January 20, 1965 about 2:30 P.M. inside room 903 of the Cairo Hotel, 1615 Q Street, N.W., Washington, D.C., and that the officers neither had an arrest nor a search warrant at thtime, (M.Tr. 4). (Counsel will designate the transcript of the hearing before Judge

McGuire as 'M.Tr.') Paul stated that about 1:00 P.M. that day he received information from a source he designated as a previous reliable source that Kleinhart was registered in room 903 of the Cairo Hotel under the alias of 'Falco' and in that room was a large quantity of narcotics which had come from a drug store housebreaking in Kensington, Maryland that previous weekend. The informant told the officer that he had left the hotel shortly before he made the phone call to Paul. (M.Tr. 5).

Paul also testified that he had previously talked to the Montgomery County Police the Monday previous to the 20th about the drug store housebreaking and got the names of two men allegedly involved, but neither was Kleinhart. (M.Tr. 6).

After receiving the call from the informant, which Paul stated had given him information in the past many times that had been reliable, he made an attempt to get a search warrant. (M.Tr. 7). He called the United States Commissioner and was informed by the Commissioner that he could not get into his building to get a search warrant, because it was Inauguration Day and he didn't have a pass. (M.Tr. 8). The Court noted that the Commissioner could have gotten a pass to the building. (M.Tr. 8). The officer then testified that he called the Court of General Sessions but no one answered the telephone. He then called an Assistant United States Attorney

and had a conversation with him. He told him about the information he received, his knowledge of the appellant and the housebreaking in Maryland and was told by the Assistant 'to go ahead up there and investigate the housebreaking and talk to this person.' (T.Tr. 8-9).

After the conversation with the Assistant U.S. Attorney. Paul, in the company with Detective Sergeants Panetta and Irving Brewer arrived at the Cairo Hotel about 2:28 P.M. They went to room 901 on the ninth floor which was directly next door to 903. (T.Tr. 10-11). Upon receiving permission from the occupant of 901, Panetta went to the windows of 901 so that he could watch the windows of 903. Paul and Brewer then went to the door of 903 and knocked. He didn't say anything and a man's voice inside asked who was there at which time Paul testified he said: 'Police Officer, Detective Paul,' and asked him to open the door. (T.Tr.11). He then heard some activity in the room and then Panetta called from 901 that the man threw the stuff out the window. (T.Tr. 11-12). Paul stated that he banged on the door again and told the man to open the door. He then stated that he heard something heavy sliding across the floor of the room and slam up against the inside of the door. He then forced the door open and found that a steel bed had been dragged and placed against the inside of the door. Kleinbart was standing by

an open window. He stated that he found a dolophine tablet on the window sill and some paraphenalia lying on a table in the room. (M.Tr.12).

Panetta left 901 and went down to a ledge on the roof of the first floor coming back with a bottle containing 28 capsules intact and 2 broken ones (M.Tr. 12). Also in the room at the time of the entry was a man named William Townsley who was arrested for narcotic vagrancy. (M.Tr. 14).

At the conclusion of the testimony and argument, the motion to suppress was denied. (M.Tr. 24).

At the beginning of the trial of this case, the motion to suppress was renewed. The Court initially read the transcript of the hearing before Judge McGuire and a transcript of testimony in a cause entitled "United States of America v. William A. Townsley" which was a proceeding in the District of Columbia Court of General Sessions following a remand from the District of Columbia Court of Appeals. The hearing took place on March 4, 1966 and consisted of the testimony of Detective Paul and the events in room 903 Cairo Hotel on January 20, 1965.

The Trial Judge was concerned with the question of the reliability of the informant. (Tr. 15).

A hearing was conducted out of the presence of the jury on the issue of the reliability of the informant, and Detective Paul was called as a witness.

Paul testified that the informant had been giving him information for a long period of time and had worked with undercover officers by taking them into the traffic and as a result the undercover officers had made about 30 cases. (Tr. 23-24). This went on for a period of about six months prior to the date in question (January 20, 1965). Paul stated that he had known the informant for a total period of about one and a half to two years prior to the arrest in this case. (Tr. 25). The informant had also made purchases at a 'pad' and a search warrant had been obtained. (Tr. 26).

Pertaining to the information given in this case, the informant had telephoned Paul and stated that appellant was in room 903 of the Cairo Hotel and that he had narcotics which had come from a pharmacy in Kensington, Maryland. (Tr. 30). Paul stated that he had previous communication from the Montgomery County Police Department about a drug store housebreaking in which narcotics were taken. (Tr. 31). He stated that he had also known appellant in the past from having arrested him. (Tr. 29). As far as the informant was concerned, Paul stated that he knew him to use drugs, but could not say that he was an addict. (Tr.33). On cross-examination it was develored that the informant's function fell into two basic catagories, introducing undercover agents and making purchases for the witness. (Tr. 35).

It also developed that the narcotics allegedly found as a result of going to room 903 consisting mostly of heroin which could not be purchased at a drug store. (Tr. 36).

At the conclusion of the evidence and argument, the Court denied the renewed motion to suppress. (Tr. 42-43).

The Government made its opening statement in which it stated that the Government would show that appellant threw a bottle out of a window of 903 Cairo Hotel. (Tr. 47-C). That the bottle contained heroin and was in the possession and control of the appellant and that he facilitated the concealment of the drugs. (Tr. 47-D). That appellant was observed to throw the bttle out of the window and that they had been in appellant's possession on January 20, 1965. (Tr. 47-E).

The first witness for the Government was John P.Panetta, formerly of the Metropolitan Police Department, Narcotic Squad. He testified that on January 20, 1965, he went to the Cairo Hotel with Officers Brewer and Paul of the Narcotic Squad and went into room 901 of the hotel which was adjacent to Room 903. He positioned himself at a window in 901 where he could see into a window in 903. (Tr. 50-56). Following some conversation with Paul, Panetta stated that he observed someone in underwear pass one of the windows and throw a bottle out of another window. (Tr. 57). At that point he

did not recognize the individual in underwear. (Tr. 58). The bottle fell to the second floor roof. (Tr. 58). After entry was gained into the room, Panetta came to 903 and saw the appellant attired in underwear and another subject fully dressed. (Tr. 59).

Panetta left, went to the second floor and retrieved a bottle containing 28 capsules of a white powder and two broken capsules. (Tr. 60-62).

The witness could only see the torso from the chesthone to just below the knee, and underwear. He did not see the figure come back from the window. (Tr. 70).

On cross-examination, Panetta stated that he could not actually see the figure at the back window, but saw his left arm come out with a bottle in his hand. (Tr. 73). At the time he saw the figure and the arm, he did not know how many persons were in the room. (Tr. 77). He could not see the individual at the back window and he did not know whether the other person in the room may have been at the window. (Tr. 82).

The next witness for the Government was David Paul of the Metropolitan Police Department, Narcotic Squad. After he testified that he went to the ninth floor of the Cairo Hotel and Panetta went into room 901, Paul stated that he went to 903 and knocked on the door. He stated that he identified himself. "I stated my name, Detective David Paul, and

I said I wanted to speak to Michael Kleinbart.' (Tr. 96). A voice said 'Wait a minute,' (Tr. 96).

Paul continued that he heard Panetta call out from the other room that 'he threw the stuff, the bottle out the window.' (Tr. 97). At this time Paul testified: "At this time I banged on the door again and I said Open the door, Kleinbart, you are under arrest for violation of narcotic laws." (Tr. 97). After hearing some thing being dragged on the floor inside the room, Paul and Brewer forced the door. When Paul entered the room he testified: "I saw the Defendant, here, Michael Kleinberg, in his underwear. He had backed toward the windows and there was a second man in the room seated completely dressed, who was seated in a chair on the right-hand side of the room." (Tr. 98).

Paul then went on to testify about the recovery of the bottle by Panetta and the removal of appellant and the other man, William Townsley from the premises.

On cross-examination, Paul stated that at the time he announced that Kleinbart was under arrest for violation of narcotic laws, he, Paul had not seen any narcotics at that time, nor did he know that a second person was in the room. (Tr. 130-131).

The final witness for the Government, was John A. Steele, a United States Chemist, who testified that an analysis of

the 26 capsules in the bottle revealed heroin hydrochloride, among other substances and an analysis of the two capsules in the chewing gum wrapper revealed cocaine hydrochloride, among other substances. (Tr. 175). An objection was made to the introducrion of the items on the search and seizure ground. (Tr. 176-181).

With the testimony of John Steele, the Government rested its case. (Tr. 186). On behalf of the appellant, a motion for judgment of acquittal was made on the ground that the Government had failed to make out a prima facie case that appellant had violated the statutes in question and that he was not seen to have had possession of the drugs. (Tr. 186-199). The motion was denied and the appellant rested its case, renewing the motion. (Tr. 199-200).

The Court during its charge to the jury instructed on the theory of 'joint possession', that is that appellant could be convicted if the jury found that he possessed the drugs jointly with another person. (Tr. 213). This was objected to at the conclusion of the Court's charge. (Tr. 218). During further instructions to the jury, joint possession was also covered and objected to. (Tr. 229-230).

The jury acquitted the appellant of Count One of the Indictment, but convicted him of Court Two. (Tr. 230).

Following the conviction, the Government filed an information alleging that appellant had been previously con-

victed of a violation of the Marijhuana Tax Act. (Title 26, U.S. Code, Section 4744). Appellant filed a post-conviction motion to relieve him of the operation of Title 26, U.S.C. 7237(d) which provide for mandatory penalties for subsequent offenders without probation or parole. This was supported by an affidavit of appellant setting forth his use and addiction to narcotics. The motion was argued to the Court on August 25, 1967 and was denied by the Court. Appellant was sentenced to serve ten (10) years. All of this is set forth in the transcript of the proceedings of August 25, 1967.

Hence an appeal was made to this Court.

STATUTES INVOLVED

The provisions of Title 21, U.S.C., Section 174, provide as follows:

> "Whoever fraudulently or knowingly imports of brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or received, or conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or consnired to commit any of such acts in violation of the laws of the United States, shall be imprisoned (as provides) (Parenthesis added)."

STATEMENT OF POINTS

L. The Trial Court erred in denying appellant's motion

to suppress evidence made before the trial and renewed during the course of the trial and admitting the narcotic drugs into evidence.

2. The Trial Court erred in denying appellant's motion to relieve him of the operation of Title 26 United States Code, Section 7237 (d) and imposing the mandatory penalty of ten (10) years without hope of probation or parole.

3. The Trial Court erred in denying appellant's motion for judgment of acquittal made at the conclusion of the Government's case and renewed at the conclusion of the entire case.

4. The Trial Court erred in instructing the jury on the theory of 'joint possession.'

SUMMARY OF ARGUMENT

1. Appellant contends that his motion to suppress should have been granted and that it was error for the Court to have admitted into evidence the items allegedly seized at the time of his arrest in the Cairo Hotel on January 20, 1965. The officers stated that they had received reliable information that appellant had narcotics at 903 Cairo Hotel. In spite of the fact, that they were required to present their information to a neutral magistrate, and in fact did contact the United States Commissioner who refused to come to town to take the affidavit, the officers without making further effort to present their information to another

magistrate or judicial officer, went to the Hotel and gained entrance to the room 903. Irrespective of what probable cause they may have had, there were no exceptional circumstances dispensing with the necessity of obtaining a warrant.

2. The Trial Court, having before it the affidavit of appellant concerning his history of addiction and admittedly, appellant was an addict, nevertheless imposed the mandatory sentence provided without hope of probation or parole. Because of the individual circumstances of appellant, he contends that the operation of Title 26, United States Code, Section 7237(d) is unconstitutional as applied to appellant. The mandatory sentence provision amounts to a cruel and unusual punishment as applied to a narcotic addict and is disproportionate to the offense and the circumstances surrounding the offense.

3. At the time of appellant's arrest, another person was in the hotel room. No officer actually saw appellant in possession of the bottle containing the drugs and it was only speculation that it was he who threw the drugs out of the window or that he exercised dominion and control over them. In view of the state of the evidence, it was speculative for the jury to conclude that appellant had possession of the drugs to permit the inference that he violated the statute in question. It was a question of speculating between appellant and the other man in the room. Therefore, the Government

failed to make out a prima facie case and the Court should have taken the case from the jury and directed a judgment of acquittal.

4. When it was the theory of the Government that the appellant had possession of the drugs in question, the fact that another person was found in the hotel room at the time of appellant's arrest did not, in and of itself, justify an instruction that the jury could convict if it found that appellant had joint possession with another. The issue of joint possession did not come into play until the conclusion of the evidence and on the face of the record, there was nothing to indicate that alleged possession of the drugs could have been jointly in both appellant and the other man. There was no evidence that the drugs were in the possession of one as opposed to the other and so therefore, there was no evidence justifying joint possession in the two.

ARGUMENT

Point One.

For the purpose of argument on Point One, the Court is invited to read the transcript of the hearing on the pre-trial motion to suppress before Judge McGuire and the first 43 pages of the trial transcript.

It appeared that on January 20, 1965, which was Inauguration Day, Officer Paul of the Narcotic Squad of the Metropolitan Police Department, received a telephone call from a

source which he characterized as a 'previous reliable source" that appellant was registered in room 903 of the Cairo Hotel under the alias of 'Falco" and that there was in that room a large quantity of narcotics which had come from a drug store housebreaking in Kensington, Maryland that previous weekend. The informant stated that he had left the hotel room shortly before the call was made. Paul testified that he had previous information about such a drug store housebreaking, but the name, Kleinhart was not given to him. Paul received this call about 1:00 P.M.

Paul contacted the United States Commissioner by telephone in order to secure a search warrant, but the Commissioner informed him that because it was Inauguration Day he could not get into the office at the Court House as he did not have a pass. Paul then attempted to contact someone at the Court of General Sessions, but received no answer on the telephone. He made no further attempt to contact a judicial officer. Instead, he contacted an Assistant United States Attorney and was told to go and investigate the housebreaking and talk to apparently the appellant.

The officer in the company of two other Narcotic Officers went to the hotel, directly to the ninth floor about 2:28 P.M. One of the officers went inside room 901 to observe the windows of 903 and Paul and the other officer went to the door of 903. After knocking and identifying

himself, he heard the officer in 901 call out that the stuff had been thrown out of the window. He banged on the door again, and called to appellant that he was under arrest for violation of the narcotic laws. Entry was obtained into the room by force and appellant was arrested. The bottle which had been thrown from the window was recovered by the officer who had been in room 901 and was subsequently found to contain narcotics. It was admitted into evidence at the trial over objection.

Parenthetically, it should be noted that the great number of capsules contained heroin hydrochloride, a contraband drug. According to counsel's information, heroin has not been sold in drug stores since 1914 after the passage of the Harrison Narcotic Act. The informants information concerning a large quantity of drugs from a drug store housebreaking was obviously incorrect.

It is the contention of appellant that the search and seizure was illegal and that the evidence should have been suppressed.

Initially, the officer failed to present the information he received to a detached and neutral magistrate. He did contact the United States Commissioner, but the Commissioner refused to come to town because he did not have a pass to get into the Court House. Counsel has found no requirement that a Commissioner must be at his office in order to issue

a warrant. It was obvious that the Commissioner could have come to police headquarters to take the affidavit. Furthermore, there was no attempt to contact any General Sessions Judge other than to make a call to that Court House. Apparently, no attempt was made to contact a District Court Judge.

The Supreme Court has held that a neutral magistrate must be interposed between the citizen and the police. McDonald v. United States, 335 U.S. 451. Johnson v. United States, 333 U.S. 10.

As recently as December 18, 1967, the Supreme Court reiterated this principle in the case of Katz v. United States, 2 Criminal Law Reporter, 3065 (Pur. of Nat'l Affairs) when it said:

> ". . .Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' Agnello v. United States, 269 U.S. 20, 33, for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer. . . be interposed between the citizen and the police. . . .'Wong Sun v. United States, 371 U.S. 471, 481-482. 'Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,' United States v. Jeffers, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well delineated exceptions."

In an earlier case of Beck v. Ohio, 379 U.S. 89, the Supreme Court pointed out at page 96:

> An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. . .

The police officers in this case circumvented the interposition of a magistrate to determine the reliability of the information and probable cause. It was only at the time of trial, did the trial Judge conduct a hearing on the issue of the reliability of the informant. Appellant contends that this did not satisfy the requirements of the Fourth Amendment, even though probable cause was established to the satisfaction of the trial Judge. For as Katz v. United States, supra, points searches without warrants are invalid irrespective of unquestioned establishment of probable cause.

Appellant contends that it is implicit in Aguilar v. Texas, 378 U.S. 108, that the underlying circumstances from which the informant spoke must first be presented to a magistrate before the search is conducted, not during the course of the trial in order to justify the admissibility of evidence.

Not having contacted another magistrate or judicial officer, the officers sought the advise of an Assistant United States Attorney who told them to go and investigate the housebreaking and talk to the person.

The officers went to the hotel, directly to the ninth floor, and one of them obtained admission to an adjoining

room for the purpose of making a surveillance of the windows of room 903.

Paul went to 903 and identified himself stating that he wanted to talk to appellant. After Panetta called that the 'stuff' had been thrown out the window, the Officer, without knowing for a fact that narcotics had been thrown out of the window, announced that appellant was under arrest for violation of the narcotics laws and subsequently forced entry into the hotel room.

Clearly, the officer did not sufficiently announce his authority and purpose when he first knocked at the door. He had nowarrant for the search of the premises, nor for the arrest of the appellant. He had, in fact no authority nor purpose and his actions in announcing the arrest of appellant and the forcing of the door were part and parcel of illegal presence and activity. Wong Sun v. United States, 371 U.S. 471.

In this case, the evidence consisting of the capsules of narcotics were recovered after having been thrown from the room. In view of the totality of the circumstances: the presence of the officers, the ambiguous announcement of authority and purpose, the forcing of the door after the announcement that something had been thrown from a window establishes that the throwing of the bottle was not voluntary, but forced by the actions of the police. Commonwealth

of Massachusetts v. Painten, 368 F.2d 142, 144 Polson v. United States, 226 F.2d 890, 894, and the police are not entitled to the fruits. This was not a case where no force was used, where entry was by consent and where the accused felt that he had successfully disposed of the contraband. See: United States v. Cachoian 364 F.2d 291.

In view of all of the premises, appellant contends that the motion to suppress should have been granted and the evidence should not have been admitted at the trial. Townsley v. United States. 215 A.2d 482.

Point Two.

For the purpose of argument on Point Two, the Court is invited to read the transcript of proceedings of August 25, 1967 and the motion and affidavit of appellant to relieve him of the operation of Title 26 United States Code, Section 7237(d).

Appellant was sentenced to serve ten years, which, pursuant to the provision of Title 26, United States Code, Section 7237(d) prohibits suspension of sentence or parole. Appellant had previously been adjudged a second offender.

On the outset, appellant should make it clear as to what he does not contend. Appellant does not contend that Title 26, Section 7237(d) of the United States Code is unconstitutional on its face. He does not contend that it is without

the power of a legislative body to provide for mandatory sentences in the case of subsequent offenders. Oyler v. Boles, 368 U.S. 448.

Appellant, however, does contend that in view of appellant's particular circumstances, the statute (Title 26. U.S.C. 7237(d) is unconstitutional as applied to appellant because it amounts to a cruel and unusual punishment.

Appellant was convicted of facilitating the concealment of twenty-eight capsules of narcotics. He was a previous narcotic offender. The facts presented to the Trial Court in his post conviction motion, by affidavit, show that appellant is a narcotics addict. Appellant submits that this is not disputed.

Appellant is fully aware that the argument, herein, is not novel to this Court. Hawkins v. United States, 109 U.S. App. D.C. 338, 288 F.2d 122; Lloyd v. United States, 119 U.S. App. D.C. 373, 343 F.2d 242; Hutcherson v. United States, 120 U.S. App. D.C. 274, 345 F.2d 964; Castle v. United States, 120 U.S. App. D.C. 398, 347 F.2d 492.

In Castle v. United States, supra., Judge Wright felt the issue was properly a matter for the Supreme Court. Chief Judge Bazelon, in his opinions in Lloyd and Hutcherson, supra. expressed concern for the problem and also considered equal protection problems. However, as Chief Judge Bazelon pointed out in Hutcherson, supra, the issue was raised for the first time on appeal. In the instant case, appellant

raised the issue before the imposition of sentence.

The Supreme Court of the United States in the case of Robinson v. California, 370 U.S. 660, struck down a state statute which made the status of being an addict a crime. Of course, appellant was not convicted of being an addict, but of the substantive offense of facilitating the concealment of narcotic drugs.

The issue, therefore, is not whether appellant should have been prosecuted for a substantive offense irrespective of his status as an addict, but whether he should be punished under the severe provisions of Title 26, United States Code, Section 7237(d), where the record shows he was an addict and the actual amount of narcotics introduced into evidence in the case was of a minimal quantity.

As Justice Douglas stated in his concurring opinion in Robinson, supra., "A punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.'"

In the instant case, appellant contends that a sentence which prohibits probation or possibility of parole, wherein it is established that appellant was an addict and that the amount of narcotics introduced into evidence against him was of a small quantity, is excessive in that it is disproportionate to the offense. See O'Neil v. Vermont, 144 U.S. 330. Weems v. United States, 217 U.S. 349. We think that this

is patently obvious in view of the fact that had appellant been prosecuted under Title 33, District of Columbia Code, Section 423, enacted by the Congress of the United States, who also enacted Title 21, United States Code, Section 174, his possible sentence would, in no wise, reach the proportions of the sentence he has received.

Point Three.

In considering Point Three, herein, appellant submits that a consideration of the entire Government's case is necessary.

The evidence showed at that time the officers went to the ninth floor of the Cairo Hotel, Panetta went to an adjoining room to observe the windows in the room where appellant and a man named Townsley were eventually found.

The officer stated that at one point he observed a man dressed in underwear pass by one of the windows and that a bottle was thrown from the back window. At that time, the officers did not know how many people were in the room. When the officers entered the room, appellant was observed in underwear and the other man, Townsley was observed with shirt and pants on seated in a chair. It was a few minutes after the bottle was thrown that the officers entered the room.

No one actually saw appellant throw the bottle out of the window and no one could say that Townsley was not at the window.

It is the contention of appellant, that the evidence was speculative as to whether or not appellant was in possession of the narcotics so as to warrant conviction. Several questions are presented. Did appellant throw the bottle out of the window? Was the other man in the room in a position to throw the bottle out of the window? Was appellant's possession, if any, sufficient to warrant a finding that it constituted dominion and control.

On the basis of all of the evidence, appellant submits that his motion for judgment of acquittal should have been granted. Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229; Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39; Arellanes v. United States, 302 F.2d 603.

Point Four.

For the purpose of considering this point, the Court is invited to read pages 202 to 230 of the transcript of the trial.

During the course of instructing the jury, the Court in defining possession, referred to joint possession, in that possession could be established if it were shown that appellant had actual or constructive possession, alone of jointly with others.

Appellant contends that it was error for the Court to have instructed the jury on the theory of joint possession.

The Government's whose theory of the case was that appellant had possession of the narcotics. At no time, during the presentation of the evidence, did the Government suggest that possessior may have been jointly in the appellant and another. This being the case, appellant contends that it was error for the Court to have instructed on the joint possession theory.

The jury should be instructed on issues concerning which evidence has been presented and not directed to matters outside the evidence. Velasquez v. United States, 244 F.2d 416. 23-A Corpus Juris Secundum, Criminal Law, Section 1312. page 792.

From the point of the opening statement of counsel for the Government tothe conclusion of their case. the entire theory of the Government was that appellant threw the bottle out of the window and was in possession of it. In view of that posture of the evidence and the theory of the case, it was error for the issue of joint possession to be submitted to the jury.

CONCLUSION

In view of the premises herein, appellant submits that the judgment of conviction be reversed.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,408

MICHAEL N. KLEINBART, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
HAROLD H. TITUS, JR.,
WILLIAM M. COHEN,
Assistant United States Attorneys.

Cr. No. 219-65

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Are the trial court's findings, that appellant's arrest in his hotel room without a warrant and the seizure of narcotics incident thereto were lawful, supported by substantial evidence and thus not "clearly erroneous"?

2. Was appellant's motion for judgment of acquittal properly denied where the evidence was such that reasonable men might or might not fairly find beyond a reasonable doubt that appellant was guilty of the crimes charged?

3. Was the trial court's instruction on "possession," including "sole or joint" possession, correct under the circumstances of this case?

4. Does a ten year sentence for violation of the federal narcotics laws amount to cruel and unusual punishment?

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*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,408

MICHAEL N. KLEINBART, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A. Summary of Proceedings.

In a two-count indictment appellant was charged on March 1, 1965, with narcotics violations which occurred on January 20, 1965 (Crim. No. 219-65). Count One charged a violation of 26 U.S.C. § 4704(a) (proscribing transactions from packages other than the original tax-stamped package); Count Two alleged an offense under 21 U.S.C. § 174 (prohibiting facilitation of concealment or sale of illegally imported narcotics). After a jury trial before Judge Aubrey E. Robinson, Jr. on June 7-9, 1967,

the jury returned a verdict of not guilty on Count One and guilty on Count Two (Tr. 230-31).[1] An Information as to appellant's previous conviction in 1958 of violating the Marihuana Tax Act, 26 U.S.C. § 4744, was filed on June 12, 1967. On August 25, 1967, appellant's motion to be relieved of the operation of 26 U.S.C. § 7237(d) was heard and denied; appellant was thereupon sentenced to imprisonment for ten (10) years (Sent. Tr. 1-34).

Prior to trial, appellant filed a written motion to suppress the evidence against him. A hearing was held on that motion on April 9, 1965 before District Judge McGuire. Detective Sergeant David Paul, one of the arresting officers, was the sole witness at that hearing. Appellant's motion was denied (M. Tr. 24). On June 7, 1967,[2] when the case came on for trial before Judge Robinson, appellant renewed his motion to suppress. Judge Robinson heard further testimony from Detective Paul with respect to the reliability of the informant in this case (Tr. 23-39). The trial judge also considered the transcripts of the hearing before Judge McGuire and the motion to suppress in *United States* v. *Townsley*, Crim. No. US 660-65,

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[1] "Tr." refers to the transcript of the trial on June 7-9, 1967;
"M. Tr." refers to the transcript of the hearing on the Motion to Suppress held April 9, 1965;
"Sent. Tr." refers to the transcript of the sentencing proceeding of August 25, 1967;
"Town. Tr." refers to the transcript of the Motion to Suppress in the District of Columbia Court of General Sessions in *United States* v. *William Townsley*, Crim. No. US 660-65, held March 4, 1966.

[2] Appellant did not appear for trial on July 22, 1965 and remained a fugitive until he was arrested in Maryland on May 25, 1966, on charges of housebreaking, grand larceny, and receiving stolen property. He was convicted of grand larceny and given a five year prison term which he was serving at the time he was returned to this jurisdiction to stand trial in this case. However, his Maryland conviction was subsequently reversed on the ground that a portion of the stolen property had been illegally seized from the car in which appellant was a passenger. However, appellant was wearing the complainant's jacket and possessed the complainant's watch at the time of his arrest. These items were not suppressed. *Kleinbart* v. *Maryland*, 234 A.2d 288 (Md. Ct. Sp. App. 1967).

District of Columbia Court of General Sessions, held March 4, 1966 (Tr. 14).[3] Based on this information, Judge Robinson also denied the motion to suppress (Tr. 42).

B. Circumstances Surrounding Procurement of Evidence.

About 1:00 p.m., on January 20, 1965, Detective Sergeant David Paul, a veteran member of the Metropolitan Police Department Narcotics Squad, received an unsolicited phone call from an individual he described as a "previously reliable source of information" (Tr. 28; M. Tr. 5; Town. Tr. 4). Paul had known this informant for approximately a year and a half to two years prior to that date. This individual had been giving Paul information for a long period of time. During a six month period in 1964, this informant had worked with the Narcotics Squad by taking undercover police officers into narcotics traffic, which resulted in the arrest of thirty persons for selling narcotics. This informant had also made purchases of narcotics for Detective Paul which resulted in the obtaining of a search warrant, narcotics arrests and seizures of narcotics. Furthermore, this source would pass on to Detective Paul any information which came to his attention which would interest the Narcotics Squad. All of the information had proven to be reliable; none had ever turned out to be unreliable (Tr. 23-27, 33-35).

The informant told Paul that "Miami Mike" was registered in Room 903 at the Cairo Hotel under the alias of "Falco." The source also said that Mike had a quantity of drug store narcotics in that room which were the fruits of a drug store housebreaking which had occurred in Kensington, Maryland, the previous weekend. The informant

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[3] Townsley was arrested in appellant's hotel room along with appellant and charged with narcotics vagrancy. His subsequent conviction was reversed and remanded by the District of Columbia Court of Appeals to allow a hearing on a motion to suppress which had not been raised below. *Townsley* v. *United States*, 215 A.2d 482 (1965). On remand, the motion to suppress was denied, and Townsley's reconviction was not appealed. Crim. No. US 660-65.

said that shortly before he called Detective Paul, he had been in Room 903 and seen the narcotics in there (M. Tr. 5; Tr. 28, 30; Town. Tr. 4).

Detective Paul asked his source if he were referring to appellant Kleinbart, and the source answered, "Yes" (Tr. 28). Paul had previously arrested appellant in 1958 for a violation of the Marihuana Tax Act and knew appellant by the nickname "Miami Mike" (Tr. 29; Town. Tr. 5). In addition, prior to receiving this call, Detective Paul had received a communication from the Montgomery County Police Department concerning a drug store housebreaking in Kensington, Maryland, which occurred the previous weekend. One man had been apprehended on the scene, while two others got away apparently with the narcotics. One of those two was believed by the Maryland authorities to be one Robert Hamilton; the third was unknown and appellant's name had not been mentioned (M. Tr. 6; Tr. 31).

January 20, 1965, was Inauguration Day, and the United States Courthouse was under security. Detective Paul therefore called the U.S. Commissioner at his home in Maryland to determine whether he would be able to obtain a search warrant for appellant's hotel room. The Commissioner informed the officer that because it was Inauguration Day and he did not have a building pass, he would be unable to get into his office to issue a warrant that day. He therefore would not come into town to issue a warrant. (M. Tr. 7-8; Town. Tr. 5, 10-12). The District of Columbia Court of General Sessions was then called, but no one answered the phone (M. Tr. 8; Town. Tr. 5). Paul then called an Assistant United States Attorney from a list of names provided to the police for obtaining information or advice when problems come up during non-working hours. Paul told the Assistant of the information he had received from his source, his knowledge of appellant and the housebreaking in Maryland, and the facts that the Commissioner was unavailable and no one answered at the Court of General Sessions. The Assistant told the officer that since appellant was registered at the hotel under an alias

and might not be there very long, Paul should go to the hotel to investigate the housebreaking and to talk to appellant (M. Tr. 8; Town. Tr. 5, 13-14).

Detective Paul, along with Detective-Sergeants Irving Brewer and John Panetta, then drove to the Cairo Hotel, 1615 Q Street, N.W., arriving there about 2:28 p.m. (Tr. 95; M. Tr. 10; Town. Tr. 5). They went directly to the ninth floor, and knocked on the door of Room 901, which is adjacent to Room 903. They obtained the permission of the occupant of 901 to allow Detective Panetta to look out the window of 901 at the windows of 903 as a precaution should the occupant of 903 throw any narcotics out the window (M. Tr. 10-11; Town. Tr. 5-6). From the rear window of Room 901 Panetta could see into the side window of Room 903 and could tell if anything were thrown out of the rear window of Room 903 (Tr. 56, 72, 77, 91).

Paul and Brewer went to Room 903 and Paul knocked at the door. Paul heard someone inside walk towards the door and a male voice asked who was there. Paul identified himself as "Detective David Paul" and said he wanted "to speak to Michael Kleinbart." The voice said, " 'Wait a minute' " and Paul could hear someone moving away from the door (Tr. 96-97; M. Tr. 11; Town. Tr. 6, 17-18).

Meanwhile, Detective Panetta was in Room 901 with the door ajar (Tr. 57, 130; Town. Tr. 6). He heard a knock on the door to Room 903 and then heard Detective Paul identify himself in a loud voice and ask to talk to Michael Kleinbart. There was a pause, and then Panetta saw someone wearing underwear run past the side window of Room 903 towards the back window a few feet away. A "flashing second" later Panetta saw a naked left arm come out the rear window of Room 903 and throw a bottle which landed on the roof of the second floor seven floors below (Tr. 57-58, 69-70, 73, 80-85). Panetta hollered to Paul that someone had thrown the "stuff" out the window in a "bottle" (Tr. 57, 78).

"Almost instantaneously" when he heard someone moving away from the door inside Room 903, Detective Paul

heard Panetta yell that "he threw the stuff, the bottle out the window," which indicated to Paul that narcotics were being discarded (Tr. 97, 129-30; M. Tr. 12; Town. Tr. 6, 17). Paul banged on the door again and said, " 'Open the door, Kleinbart, you are under arrest for violation of narcotic laws.' " He then heard something heavy sliding along the floor inside and it slammed up against the inside of the door. Detectives Paul and Brewer forced the door open at that point and found a steel bed had been placed up against it (Tr. 97, 115-17, 130; M. Tr. 12; Town. Tr. 6-7).

Appellant Kleinbart was standing in Room 903 near the rear window dressed only in his underwear (Tr. 58, 98, 171; M. Tr. 12; Town Tr. 7). Appellant was immediately placed under arrest (Tr. 128; Town. Tr. 7). On the rear window sill, Paul found one tablet of Dolophine, a drug store narcotic (Tr. 37; M. Tr. 12). The only other occupant of the room was William Townsley, who was seated in a chair on the right side of the room when the officers entered next to a table upon which were found narcotics paraphernalia. Townsley was fully dressed in pants and a long-sleeved shirt (Tr. 80-83, 98-99, 131-32, 142-43; M. Tr. 12; Town. Tr. 7).

Panetta had followed the flight of the bottle thrown from the window of Room 903 until it landed on the second floor roof (Tr. 58, 70). Paul looked out the side window of Room 903 and Panetta pointed out the object which appeared to Paul to be a bottle. Paul kept his eye on it while Panetta went down to the second floor roof and retrieved this object. Panetta returned to Room 903 and handed Paul a bottle labeled "Amitone." Inside the bottle were 26 loose capsules containing a white powder, 2 broken capsules, and two capsules containing a white powder wrapped in a piece of paper (Tr. 60-62, 101-102, 124-127, 136; M. Tr. 12; Town. Tr. 7). At trial, Treasury Chemist John Steele testified he found heroin in the 26 loose capsules, cocaine in the two capsules wrapped in a piece of paper, and traces of heroin on some of the narcotics

paraphernalia and empty capsules found on the table (Tr. 175-83).

At the time of his arrest, appellant stated that he had thrown the bottle out the window and that all the capsules, the tablet and the paraphernalia were his. He further stated that he had purchased fifty capsules the day before at $1.50 a capsule, that he was using some of it himself, and that he was selling some of it at $2.00 a capsule (M. Tr. 13, 16; Town. Tr. 7).[4]

Appellant did not testify either at the motion to suppress hearing before Judge McGuire, at the renewed motion to suppress hearing before Judge Robinson, or at trial. Appellant rested his case at trial without introducing any evidence following the trial judge's denial of his motion for a judgment of acquittal at the conclusion of the government's case (Tr. 199-200).

Judge McGuire found that the security requirements of Inauguration Day which prevented the U.S. Commissioner from having access to his office in the United States Courthouse to issue warrants created exceptional circumstances which justified appellant's arrest without a warrant (M. Tr. 19).

After considering the testimony before Judge McGuire, the testimony in the motion to suppress in *Townsley*, and the testimony before him on the reliability of the informant, Judge Robinson concluded (Tr. 42-43):

1) that the officers had sufficient information when they went to Room 903 at the Cairo Hotel to conduct an investigation into the housebreaking;

2) that the reliability of the informant and his information about what was in Room 903 plus Officer Panetta's observations from Room 901 of the arm throwing a bottle from Room 903 created probable cause that an offense was being committed in the officers' presence which justified appellant's arrest and the subsequent seizure of the bottle containing narcotics and the narcotics paraphernalia; and

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[4] Appellant's admissions were not proffered or introduced by the government at trial.

3) that the possibility that appellant, who was registered at this hotel under an alias, would not remain there for an extended period of time plus Detective Panetta's observation of an attempt to destroy or discard contraband were exceptional circumstances which justified the entry into appellant's hotel room, his arrest and the seizure of evidence without a warrant.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 21, United States Code, § 174, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
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> Whenever on trial for violation of this subsection the defendant is shown to have or to have had posses-

sion of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provisions relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.

SUMMARY OF ARGUMENT

I

The trial court's findings that 1) the officers were justified in going to appellant's hotel room to conduct an investigation, that 2) the reliable information they had, combined with their observations at the hotel of a bottle being thrown from Room 903, created probable cause that a narcotics offense was being committed in their presence which justified appellant's arrest, and that 3) exigent circumstances were present which permitted their entering appellant's hotel room without a warrant to make that arrest and subsequent seizure are supported by substantial evidence in the record and are legally sound. On review, these findings cannot be said to be "clearly erroneous." Therefore, the narcotics evidence was properly admitted at trial.

II

There was sufficient evidence from which the jury could infer that the man wearing only his underwear in Room 903 threw the bottle containing narcotics out the rear window of that room. Since appellant was the only one in that room wearing only underwear reasonable men could infer beyond a reasonable doubt from all the circumstances that appellant had the requisite possession of these narcotics to sustain his guilt for the crimes charged. Hence, the trial court properly denied appellant's motion for a judgment of acquittal.

III

The trial court's instructions on "possession," taken as a whole, clearly charged the jury that the possession which would support an inference of guilt must be that of appellant himself, either alone or jointly with others, and not that of some other person on the premises. However, the court was not required to instruct that the government must prove beyond a reasonable doubt that appellant's possession was "exclusive" of all others. Therefore, appellant's objection to this instruction was properly overruled.

IV

The mandatory minimum sentence imposed on appellant because of his previous conviction for a narcotics offense does not constitute cruel and unusual punishment in violation of the Eighth Amendment. *Robinson* v. *California*, 370 U.S. 660 (1962), cannot be relied on for the proposition that possession, sale or use of narcotics by an addict runs afoul of that amendment; indeed that decision reaffirms the power to penalize for such offenses. In view of the several cases in this jurisdiction which have rejected appellant's contention, his argument is without merit.

ARGUMENT

I. The trial court's findings that the narcotics and paraphernalia admitted into evidence were not unlawfully obtained are supported by substantial evidence and are not "clearly erroneous."

Appellant's sole contention in seeking to suppress the narcotic evidence introduced at trial is that his arrest and the subsequent seizure of the bottle containing narcotics and the narcotics paraphernalia were illegal because the arresting officers failed to obtain a warrant before going to and entering appellant's hotel room to make their arrest and seizure.

Appellee submits that the trial court's findings that 1) the officers were justified in going to the hotel room to con-

duct an investigation, that 2) the reliable information they had, combined with their observations at the hotel, created probable cause that a narcotics offense was being committed in their presence which justified appellant's arrest, and that 3) exigent circumstances were present which permitted their entering appellant's hotel room without a warrant to make that arrest and subsequent seizure are supported by substantial evidence in the record. Therefore, on review by this Court, these findings cannot be said to be "clearly erroneous." See *(Sheilah C.) Hicks* v. *United States*, —— U.S. App. D.C. ——, 382 F.2d 158, 161 (1967); *(Henry) Jackson* v. *United States*, 122 U.S. App. D.C. 324, 326-27, 353 F.2d 862, 864-65 (1965).

Indeed the evidence as to the procedure followed by the officers in this case is clear and uncontradicted. Detective Paul received information from an informant on the afternoon of Inauguration Day that appellant was in Room 903 of the Cairo Hotel registered under an alias and was in possession of narcotics which were the fruits of a drug store housebreaking committed in Maryland the previous weekend. The informant told Paul he had just been inside Room 903 and had seen the narcotics in there. Detective Paul's testimony before Judge Robinson clearly established that his informant was a "previously reliable source of information." *McCray* v. *Illinois*, 386 U.S. 300, 302-04 (1967). Thus, Paul's testimony informed the court of the "underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant * * * was 'credible' or his information 'reliable.'" *Id.* at 304; *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964). This information, combined with Paul's knowledge of the housebreaking and that appellant was a prior convicted narcotics offender would, we submit, have justified a magistrate in issuing a search warrant for appellant's hotel room. *McCray* v. *Illinois*, *supra*; *Jones* v. *United States*, 362 U.S.

257, 267-72 (1960). Appellant does not contend otherwise.

The officer's first response was to seek to obtain just such a search warrant. However, because it was Inauguration Day the United States Courthouse was under security. The U.S. Commissioner when reached at home in Maryland stated that he did not have a building pass and therefore could not get into his office to issue a warrant. No one answered the phone at the Court of General Sessions. Thwarted in his attempts to obtain a search warrant, Det. Paul sought the advice of an Assistant United States Attorney, and it was pursuant to the Assistant's advice that Paul and his fellow officers went to the Cairo Hotel to investigate the housebreaking and to talk to appellant.

Clearly "the police were not seeking to bypass the commissioner." *Robbins* v. *MacKenzie*, 364 F.2d 45, 49 (1st Cir.), *cert. denied*, 385 U.S. 913 (1966). In seeking the advice of an Assistant United States Attorney when frustrated in their attempts to obtain a warrant, the officers cannot be said to be acting arbitrarily or unreasonably. The Assistant readily recognized the exigencies of the situation confronting the officers. Reliable information had been provided that a convicted narcotics offender was registered in a District of Columbia hotel under an alias and was in possession of narcotics stolen a few days before from a drug store in another jurisdiction. The likelihood that appellant would leave the hotel and/or consume or dispose of the narcotics was sufficiently great that a delay of even one day before taking some appropriate action would undoubtedly have prevented effective law enforcement. *Chappell* v. *United States*, 119 U.S. App. D.C. 356, 359-60, 342 F.2d 935, 938-39 (1965).

However, rather than risk a violation of the Fourth Amendment by an arrest or search in appellant's hotel room without a warrant, the Assistant advised the officers to go to the hotel to *investigate* the housebreaking by *talking* to appellant. It cannot seriously be contended that, by following this advice and proceeding to appellant's

hotel room, knocking on the door, and announcing their identity and desire to talk to appellant, the officers acted unlawfully. *Robbins* v. *MacKenzie, supra; United States* v. *Cachoian*, 364 F.2d 291, 292 (2d Cir. 1966); *United States* v. *Gorman*, 355 F.2d 151, 158-60 (2d Cir. 1965); *Ellison* v. *United States*, 93 U.S. App. D.C. 1, 3-4, 206 F.2d 476, 478-79 (1953).

As the Supreme Court said recently in *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966):

> There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment, if they act too soon * * *. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

In response to the officer's lawful request to speak to him, which request was unaccompanied by any threat of forced entry for the purpose of arrest, search or otherwise, appellant chose to throw a bottle containing narcotics out the window. Such a voluntary act cannot in any way be attributed to "illegal" police activity since none existed at the time. *United States* v. *Cachoian, supra; United States* v. *Lewis*, 227 F. Supp. 433, 435 (S.D.N.Y. 1964). Appellant's assertion that "the throwing of the bottle was not voluntary, but forced by the actions of the police" (Brief for Appellant at 19), is completely unsupported by the record. Appellant did not testify at any proceeding in this case and his subjective motives for his conduct are not of record; hence he may not claim that his actions were caused by either threatened or actual police illegality, the existence of which is not otherwise supported by the record. *Cf. Pyles* v. *United States*, 124 U.S. App. D.C. 129, 132, 362 F.2d 959, 962, *cert. denied*, 385 U.S. 994 (1966); *Green* v. *United States*, 104 U.S. App. D.C. 23, 25, 259 F.2d 180, 182 (1958), *cert. denied*, 359 U.S. 917 (1959).

Detective Panetta's observation of a bottle being hurriedly thrown from the rear window of Room 903 almost immediately after Detective Paul asked to talk to appellant was communicated by Panetta to Paul. This knowledge combined with the reliable information received by Paul from his informant, under the circumstances, justified Paul's belief that appellant was then illegally in possession of and was attempting to conceal or destroy narcotics. Hence, Paul "had probable cause and reasonable grounds to believe that [appellant] was committing a violation of the laws of the United States relating to narcotic drugs at the time" in the officers' presence. *Draper* v. *United States*, 358 U.S. 307, 314 (1959); *McCray* v. *United States*, *supra*; *Ellison* v. *United States*, *supra*.[5] The fact that the officers had not actually seen the capsules containing the white powder in the bottle before Paul announced his intent to arrest appellant for violating the narcotics laws and forcibly entered the room did not, under the circumstances of this case, preclude these experienced narcotics officers from having a reasonable belief that the discarded bottle contained contraband narcotics. *Brinegar* v. *United States*, 338 U.S. 160 (1949); *Bell* v. *United States*, 102 U.S. App. D.C. 383, 387, 254 F.2d 82, 86, *cert. denied*, 358 U.S. 885 (1958).

Finally, the unavailability of a magistrate, the knowledge of appellant's presence in a hotel under an alias, and the obvious example of what the officers reasonably believed was an attempt by appellant to destroy or discard narcotics certainly constituted exceptional circumstances which justified the forced entry into appellant's room for the expressed purpose of arresting appellant for violating the narcotics laws. *Warden* v. *Hayden*, 387 U.S. 294, 298-99 (1967); *Ker* v. *California*, 374 U.S. 23, 37-41 (1963);

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[5] Of course, Detective Panetta's trained observations from Room 901 are imputable to Detective Paul who was the actual arresting officer. See *(James E.) Smith* v. *United States*, 123 U.S. App. D.C. 202, 358 F.2d 833 (1966), *cert. denied*, 386 U.S. 1008 (1967).

Wong Sun v. *United States*, 371 U.S. 471, 484 (1963); *McDonald* v. *United States*, 335 U.S. 451, 454-55 (1948); *Chappell* v. *United States*, *supra*; *(Eugene) Smith* v. *United States*, 103 U.S. App. D.C. 48, 254 F.2d 751, *cert. denied*, 357 U.S. 937 (1958); *Ellison* v. *United States*, *supra*. Force was, of course, necessary to gain entrance in this case since Detective Paul's second knock and announced intent to arrest appellant after the bottle had been jettisoned was met from inside by a heavy object being slammed against the door. See *Miller* v. *United States*, 357 U.S. 30 (1958).

Thus, it is apparent that the seizure of the discarded bottle containing narcotics and the narcotics paraphernalia in appellant's room was incident to his arrest based on probable cause he was violating the narcotics laws at the time. The legality of such a seizure does not depend, therefore, on whether the police could or should have obtained a search warrant before entering Room 903. The lawfulness of an arrest without a warrant, whether in a home or hotel room or on the street, depends on the existence of probable cause which is present when " 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.' " *McCray* v. *Illinois*, *supra*; *Ker* v. *California*, *supra* at 34-35; *Brinegar* v. *United States*, *supra* at 175-76. Appellant does not dispute the fact that probable cause for his arrest was present in this case. Hence, the seizure of the narcotics evidence incident thereto was lawful.

It should be noted that this is not a case where the officers had appellant under surveillance for months without seeking a search warrant, *McDonald* v. *United States*, *supra*, or where probable cause was not established until the officers gained entrance to appellant's room under circumstances where contraband was not threatened with destruction or removal. *Johnson* v. *United States*, 333 U.S. 10 (1948). Nor is this a case where the record "does not contain a single objective fact to support a belief by the

officers that the petitioner was engaged in criminal activity at the time they arrested him." *Beck* v. *Ohio*, 379 U.S. 89, 95 (1964). Here the officers were not relying on an "uncorroborated tip by an informer whose identity and reliability are both unknown." *Contee* v. *United States*, 94 U.S. App. D.C. 297, 299, 215 F.2d 324, 326 (1954); and see *Wong Sun* v. *United States*, *supra* at 480. Nor was appellant the subject of continuous surveillance which led to the planting of an electronic eavesdropping device in an area from which appellant sought to exclude the public. *Katz* v. *United States*, 36 U.S.L. WEEK 4080 (December 18, 1967).

In contrast, here "the officers' conduct was entirely reasonable from start to finish." *Ellison* v. *United States*, *supra* at 4, 206 F.2d at 479. They sought to obtain a search warrant immediately after receiving information from a reliable source. They were prevented from obtaining that warrant by the unavailability of a magistrate caused by the security provisions necessitated by a presidential inauguration, a situation which occurs but once every four years. Nevertheless, the situation required prompt action and, acting with the advice of an Assistant United States Attorney, they began an investigation which was expressly limited to an attempt to talk to appellant concerning the information they had received. At no time before appellant discarded the contraband in plain view of Detective Panetta did Detective Paul attempt to forcibly or peacefully enter appellant's room or express an intention to arrest appellant or search his room. The distinctions, therefore, between this case and *Massachusetts* v. *Painten*, 368 F.2d 142 (1st Cir. 1966), *cert. dismissed*, 36 U.S.L. WEEK 3283 (Jan. 15, 1968); and *Hobson* v. *United States*, 226 F.2d 890 (8th Cir. 1955), relied on by appellant, are manifest.

In *Painten*, two Boston policemen, knowing of a holdup and knowing that Painten and his companion were "suspicious characters," but having no reason to connect them with the crime they were investigating, "set out to arrest and search the men in the hope that evidence would de-

velop." 368 F.2d at 143-44. They followed Painten to his apartment and gained entrance thereto on the pretext of wishing only to talk to him. However, before admitting the officers, Painten tossed a paper bag onto a fire escape which was witnessed by a policeman posted below. The officer went to the apartment, walked through it while his partners were questioning its occupants, and went out onto the fire escape, where he found guns and bullets in the bag. *Ibid.* Both the District Court and the First Circuit agreed that "since the officers had no probable cause to arrest when they entered the apartment," 252 F. Supp. 851, 856-57 (D. Mass. 1966), with the intent "to search and arrest the men in the hope that evidence would develop," their entry was illegal; "since their actions were improper, the police were not entitled to the fruits." 368 F.2d at 144.[6]

In *Hobson*, the police went to appellant's house without an arrest or search warrant to arrest appellant's wife for a sale of narcotics made to an undercover officer one month before. Upon arrival, the officers identified themselves to the wife at the front door and *demanded* admittance. Meanwhile, appellant threw a non-descript package out a rear window into his backyard, which act was witnessed by an officer posted there. There was a dispute as to

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[6] The Supreme Court at first granted certiorari in *Painten*, but on January 15, 1968, dismissed it as improvidently granted. 36 U.S.L. WEEK 3283. Three justices dissented on the ground that the policeman's subjective unlawful intention to violate the Fourth Amendment if he can achieve his goal in no other way, does not vitiate the fruits of his actual conduct which is limited to the entry into a home for the expressed lawful purpose of questioning the occupant who consents to such an entry. As Mr. Justice White stated: "If the policeman does more we will bar admission of the fruits of his illegal action. But if he does only so much as he has told the occupant he will do, and so less than he was willing to do, the occupant's consent was to the conduct which occurred; in that case there is no reason to exclude what the policeman learns from doing what the occupant consented to his doing." *Id.* at 3284. Mr. Justice Fortas, in concurring in the dismissal of certiorari, also stated that he did not disagree with the dissenters' view that "the court below erred in relving on its inferences as to the undisclosed intent of the officers." *Ibid.*

whether the officers broke in before or after appellant threw the package. In any event they could not know the contents thereof before they entered. Noting that the probable cause for the arrest of appellant's wife was doubtful since she was later acquitted as a purchasing agent and no warrant had been sought for her arrest in the month-long period, 226 F.2d at 891-92, the Eighth Circuit held there was insufficient evidence to justify appellant's arrest at the time of the break in. *Id.* at 894. Hence, the package containing heroin which remained on appellant's property although thrown as a response to the officer's illegal actions was illegally seized. *Ibid.*

Here the officers' stated and actual purpose was only to talk to appellant; the *bottle* was thrown before any attempt or threat to enter was made; observation of this act was communicated to Detective Paul and in this case created a reasonable belief that appellant was discarding narcotics; and entry was made for the announced purpose of arresting appellant for an offense reasonably believed to be occurring at that time. Therefore, the narcotics and paraphernalia were lawfully obtained and properly admitted into evidence.[7]

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[7] Since the trial court ruled that the bottle with narcotics had been recovered as an incident to a lawful entry and arrest, it did not reach the question of whether this evidence had been abandoned by appellant. It is submitted, however, that by throwing this bottle out a hotel room window where it landed on a roof seven stories below immediately following the officers' request only to talk to him, appellant abandoned this property. Its recovery, therefore, by the police, who witnessed the abandonment before they attempted to enter Room 903, is not a "search" or a "seizure" within the meaning of the Fourth Amendment. *E.g.*, *Hester* v. *United States*, 265 U.S. 57 (1924); see *Massachusetts* v. *Painten*, *supra* at 3284-85 (dissenting opinion). Of course, the seizure of the narcotics paraphernalia in the room must be justified by the legality of the entry and arrest.

II. There was ample evidence from which the jury could conclude beyond a reasonable doubt that appellant was guilty of the crimes charged.

(Tr. 56, 57-58, 69-70, 72-73, 77, 78, 80-85, 91, 97-99, 130-32, 171)

Appellant contends that there was insufficient evidence that he possessed the bottle containing narcotics from which the jury could have found beyond a reasonable doubt that he was guilty; he asserts, therefore, that his motion for judgment of acquittal should have been granted.

Appellee submits that assuming the truth of the government's evidence and viewing that evidence in the light most favorable to the government, as the trial court and this Court must, there was ample evidence from which the jury might or might not have found appellant guilty beyond a reasonable doubt of the crimes charged. *Crawford* v. *United States*, —— U.S. App. D.C. ——, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

The evidence at trial against appellant was as follows: Detective Panetta was stationed in Room 901 adjacent Room 903; from the rear window of Room 901 he could see into the side window of Room 903 and could tell if anything were thrown out of the rear window of Room 903 (Tr. 56, 72, 77, 91). The door to Room 901 was ajar (Tr. 57, 130). Panetta heard a knock on the door to Room 903 and then heard Detective Paul identify himself in a loud voice and ask to talk to Michael Kleinbart. After a short pause, Panetta saw someone wearing underwear run past the side window of Room 903 from the direction of the door therein towards the rear window which was but a few feet past the side window. A "flashing second" later Panetta saw a naked left arm come out of the rear window of Room 903 and throw a bottle which landed on the second floor roof (Tr. 57-58, 69-70, 73, 80-85). Panetta hollered to Paul the substance of what he had seen. (Tr. 57, 78).

When Paul first knocked on the door of Room 903, he heard a male voice from inside ask who was there. After Paul identified himself and asked to speak to appellant, the voice said, "'Wait a minute,'" and Paul could hear someone inside moving away from the door (Tr. 96-97). "Almost instantaneously" Paul heard Panetta yell that "he threw the stuff, the bottle out the window" (Tr. 97). Upon gaining entrance a few minutes later, Paul found appellant standing in Room 903 near the rear window dressed only in his underwear (Tr. 58, 98, 171). The only other occupant of the room was William Townsley, who was seated in a chair on the right side of the room when the officers entered. Townsley was fully dressed in pants and a long-sleeved shirt (Tr. 80-83, 98-99, 131-32). Paul recalled having to roll up a sleeve on Townsley's shirt in order to examine his arm for needle marks (Tr. 132).

From these facts reasonable men could well infer that appellant was the man who threw the bottle out the window which later proved to contain narcotics. In view of the paraphernalia which contained traces of narcotics which were found in plain view on a table in the room and the attempt by the occupants of the room to prevent the officers entrance by placing a steel bed in front of the door, appellant's attempt to discard this incriminating evidence created a sufficient inference of his knowledge of the bottle's contents and his dominion and control thereover to justify his conviction. See *Cooper* v. *United States*, 123 U.S. App. D.C. 83, 85-86, 357 F.2d 274, 276-77 (1966).

Clearly, this was not a situation where there must have been a reasonable doubt in a reasonable mind of appellant's guilt in this case. *Crawford* v. *United States*, *supra*; *Curley* v. *United States*, *supra*. Appellant's motion for judgment of acquittal was, therefore, properly denied.

III. The trial court's instructions on "possession" were correct.

(Tr. 197-98, 213, 218)

The trial court gave the following instruction on the meaning of the term "possession" as used in the statutes appellant was charged with violating:

> Now, possession: The law recognizes two kinds of possession. There is actual possession and there is constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.
>
> Now, a person who, although not in actual possession, knowingly has the power and the intention at a given time to exercise dominion or control over a thing either directly or through another person or persons, is then in constructive possession of it.
>
> The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, their possession is joint.
>
> Mere presence in the vicinity of a narcotic drug, or mere knowledge of its physical location does not constitute possession.
>
> If you find beyond a reasonable doubt that the Defendant, either alone or jointly with others, had actual or constructive possession of the narcotic drug described in the indictment, then you may find that such narcotic drug was in the possession of the Defendant within the meaning of the word "possession" as used in these instructions.

Appellant objected to that portion of the instruction which dealt with "joint possession" on the ground that the government's theory was that appellant alone had possession of the bottle containing the narcotics (Tr. 218). The trial court overruled this objection on the ground that appellant's own theory was that Townsley might have possessed this bottle despite the government's strong circumstantial case that appellant, the only one in underwear,

threw the bottle out the window. In view of the narcotics paraphernalia found on the table in plain view when the officers entered this single room hotel suite occupied by only two men, the trial court ruled that the jury was entitled to consider all three possibilities, *i.e.*, that appellant alone, Townsley alone, or both of them jointly had either actual or constructive possession of the narcotics as those terms were defined (Tr. 197-98).

We submit that the trial court's position was eminently correct. The above-quoted instructions made it clear that the government must establish "beyond a reasonable doubt that *the Defendant*, either alone or jointly with others, had actual or constructive possession of the narcotic drug described in the indictment" (Tr. 213). (Emphasis added.) See *Miller* v. *United States*, 121 U.S. App. D.C. 13, 15, 347 F.2d 797, 799 (1965). The court was not required, however, to instruct that the government must establish that appellant's possession was "exclusive" of any other individual's. It seems evident "from the charge as a whole" that the "jury could not fail to understand * * * that the possession which will support an inference of guilt is that of the defendant himself, not of some other person on the premises." *(Frederick H.) Scott* v. *United States*, No. 20,996, D.C. Cir., January 31, 1968 (unreported opinion).

IV. The mandatory minimum sentence imposed on appellant because of his previous conviction for a narcotics offense does not amount to cruel and unusual punishment.

(Sent. Tr. 27-28, 31) (M. Tr. 13, 16)

Appellant contends that the mandatory minimum sentence of ten years imprisonment for this his second conviction for a federal narcotics violation constitutes cruel and unusual punishment as applied to him because he is a narcotics addict. His pre-sentencing motion to be relieved of the operation of 26 U.S.C. § 7237(d), which re-

quires this sentence, was denied by the sentencing judge (Sent. Tr. 31).

In *Hutcherson* v. *United States*, 120 U.S. App. D.C. 274, 345 F.2d 964, *cert. denied*, 382 U.S. 894 (1965), an addict was arrested for drinking in public and was found to be in possession of a vial containing 28 capsules of heroin. Convicted under 21 U.S.C. § 174, he received the mandatory minimum sentence of ten years because of two prior narcotics convictions. His argument that such a sentence constituted cruel and unusual punishment was characterized by this Court as "so obviously unsound that detailed discussion is unnecessary." *Id.* at 277, 345 F.2d at 967.

In *Castle* v. *United States*, 120 U.S. App. D.C. 398, 401, 347 F.2d 492, 495 (1964), *cert. denied*, 381 U.S. 929 (1965), this Court stated that this same "argument, although neither remote nor insubstantial, is one which, in the light of the great weight of cases which have imposed such punishment, is more properly to be made to the Supreme Court."

More recently this argument was again raised and rejected in *(John L.) Worthy* v. *United States*, No. 20,322, D.C. Cir., *aff'd by order*, February 17, 1967, *rehearing en banc denied*, May 2, 1967.

Moreover, the Supreme Court's decision in *Robinson* v. *California*, 370 U.S. 660 (1962), reaffirmed the legislative authority "to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs." While the mere "status" of addiction cannot be made a crime, there are no constitutional prohibitions against "criminal sanctions [for] the unauthorized manufacture, prescription, sale, purchase or possession of narcotics." 370 U.S. at 60. Thus, *Robinson* supports the constitutional validity of the penalty imposed upon appellant, and of the federal statutes providing for that penalty.

Hence, appellant's contention flies in the face of this Court's numerous refusals to entertain such a challenge to the federal narcotics laws even as applied to possession of narcotics. *Hutcherson* v. *United States, supra; Castle* v.

United States, supra. Without exception it has been held that the penalty imposed on appellant represents a clearly justifiable legislative response to the menace of illicit drug traffic. *E.g., Blockburger* v. *United States*, 284 U.S. 300 (1932).[8]

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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United States Attorney.

FRANK Q. NEBEKER,
HAROLD H. TITUS, JR.,
WILLIAM M. COHEN,
Assistant United States Attorneys.

[8] We note that in his affidavit in support of his pre-sentencing motion appellant averred that he never sold or made a profit from narcotics. Record in Crim. No. 219-65. However, at the time of his arrest appellant told Detective Paul that he had been selling some of the narcotics he purchased for $1.50 a capsule at the rate of $2.00 a capsule (M. Tr. 13, 16). We submit that this conflict renders the remainder of this affidavit, as noted by the sentencing judge (Sent. Tr. 27-28), extremely suspect.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 290289 597

R E P L Y B P I E F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

MICHAEL N. KLEINBART,

Appellant

v.

UNITED STATES OF AMERICA,

, Appellee

No. 21,408

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM J. GARBER
412 Fifth Street, N.W.
Washington, D.C. 20001

Attorney for Appellant

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ARGUMENT

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Appellant contends that regardless of the characterization placed upon the officers' actions in going to the hotel room, i.e. to conduct an investigation. We submit that the facts and evidence conclusively show that the officers intended to effect a search of those premises, having been frustrated in their attempt to obtain a search warrant.

Officer Paul testified that he received a telephone call from a "previously reliable source" that one Kleinbart, of 'Miami Mike' was registered at the Cairo Hotel, Room 903, under the name of 'Falco'.

The source informed Paul that there were a quantity of narcotics in the room which had been previously taken from a drug store housebreaking in Kensington, Maryland that weekend.

Paul had previous information as to the housebreaking, but no information that Kleinbart was connected with it. It developed that the narcotics found were, in fact, not drug store narcotics, save for one Dolophin tablet found on the

window sill. There was nothing to connect this tablet with the housebreaking.

Armed with this knowledge, Paul testified that he attempted to obtain a search warrant. He contacted the United States Commissioner at home, but the Commissioner refused to come to town to issue the warrant.

Paul's only other attempt to obtain a judicial officer was to call the Court of General Sessions, but received no answer from the telephone. No further attempt was made to contact any Judge or Magistrate.

After being advised by the Assistant U.S. Attorney to go to the hotel and talk to this person (meaning, perhaps Kleinbart) the officers went directly to the ninth floor of the Hotel.

Even though this was a hotel, with a front desk which maintained a register of guests, no attempt was made prior to going to the ninth floor to ascertain whether or not, in fact, a "Falco" was registered in room 903. The officer's explanation for this was that they were fearful that a call would be made to the room alerting the occupants that the police were on their way. However, it apparently never occurred to the officers to post one of their member at the desk to insure that a call would not be made. This does not necessarily imply that force could be used to prevent a desk clerk from making a call, but surely the presence of an officer would certainly have frustrated such an attempt.

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In other words, when the officers went to the ninth floor of the hotel they had no corroborative knowledge that appellant was at the hotel and in Room 903.

In toto, the officers did not have personal knowledge that appellant was in the hotel room until after the entry was effected. The voice inside the room did not acknowledge that he was appellant when the officer first announced his presence.

Furthermore, the officers did not know the contents of the bottle thrown until after it was recovered and the officers were in the room.

Finally, appellant was placed under arrest prior to the forced entry into the hotel room for violation of the narcotics laws and before the bottle was recovered.

The sum total of the information concerning the occupancy of the hotel room and the identity of appellant came from the telephone call, and before actual entry was effected into the hotel room, the identity of appellant as being the occupant was not personally known to the officers.

The Government cites the case of Draper v. United States, 358 U.S. 307, as an authority for the legality of the officer's actions. (Page 14 of the Brief for Appellee). However, there are significant differences in Draper which do not appear in the instant case. In Draper, the officers had information that a certain person would alit from a Chicago train carrying an object. The person was described. The

officers went to the train station, met a Chicago train and actually saw an individual who fit the description given by the source. The Supreme Court held that the information received by the source, plus the observation by the officers which confirmed the information given as to the train and the physical description of the person justified the arrest.

In the instant case none of the information given by the informant was corroborated by the officers as to the identity of appellant and the fact that he was registered in the hotel under the alias "Falco" prior to the actual entry into the room after the announcement that appellant was under arrest.

The Government seeks to justify the entry of the officers into the hotel room and the fact that their actions did not constitute an attempt to by-pass the commissioner by, first the case of Robbins v. MacKenzie, 364 F.2d 45. However, that case involved consent on the part of the occupant to the officer's entry, whereas there is no element of consent in this case. Further, in the case of United States v. Cachoian, 364 F.2d 291, the defendant, in that case, after being aware of the officers at the door threw the narcotics out of the window and then opened the door and admitted the officers. The Court held that the defendant consented to the entry of the officers feeling secure that he had discarded the contraband. The crucial element is not involved in this case as

as the officer here forced their way into the hotel room.

In the case of United States v. Gorman, 355 F.2d 151, one Roche admitted officers into his motel room. The officers went there to discuss a bank robbery. Roche consented to the search of his suitcase where evidence was found. There, the Court found that Roche had consented to the entry of the officers and the search of the suit case.

In the case of Ellison v. United States, 93 U.S. App. D.C. 1, 206 F.2d 476, officers went to defendant's home to talk to him about a drug store housebreaking. While waiting on the front porch of defendant's home they observed several medicine bottles and other articles which matched the description of things taken. They were then admitted to the house by defendant's mother and went to defendant's room where they arrested him. Here there were articles in plain view seen by the officers from a place where they had a right to be. Also, the Court pointed out that the entry into the house was a peaceable one.

None of the above cases relied upon by the Government are applicable to the case here.

We submit that it is obvious from the start that the intention of the police was to secure entry into the hotel room for the purpose of making a search. This is fortified by the fact that they sought to obtain a search warrant on the basis of the information they received. Further, when

they got to the hotel room they did not announce their authority and purpose, but only identified themselves as police. The posting of an officer in an adjoining room to observe and then going to the room door itself indicates that the whole design was to effect an entry.

It is submitted that the case must be viewed as a whole and that the actions of the officers from the beginning were unlawful. We reaffirm our reliance on the cases of Massachusetts v. Painten, 368 F.2d 142, cert dismissed 36 U.S.L. Week 3283 and Hobson v. United States, 226 F.2d 890.

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